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IN THE

Supreme Court of the United States

October Term, 1963
No. 72

BRADLEY R. SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petitioner.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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This brief is filed with the consent of both parties pursuant to Rule 42(2) of this Court. The written consents are being forwarded to the Clerk of this Court concurrently herewith.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a non-profit membership corporation dedicated to the preservation of, *inter alia,* the constitutional right to freedom of expression and due process of law. It believes that freedom of expression is indispensable under our constitutional system. It believes that the suppression of the book, Tropic of Cancer, as has been done here by criminally prosecuting and convicting a bookseller who, along with other books of all kinds, offers the book for sale to those members

of the public who desire to read it, violates fundamental rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This is not the first time the ACLU has contended that the book cannot constitutionally be suppressed. More than a decade ago, then by the Northern California affiliate, and prior to this Court's clarification of the law in *Roth v. United States,* 354 U. S. 476, it was so contended (*United States v. Two Obscene Books,* 99 F. Supp. 760 [N.D. Cal. 1951], affd. sub. nom. *Besig v. United States,* 208 F. 2d 142 [C. A. 9 1953]).[1] And it was so contended by the attorneys for amicus as attorneys for plaintiffs and appellants in *Zeitlin v. Arnebergh,* 59 A. C. 930, 383 P. 2d 152, 31 Cal. Rptr. 800.

Hence this brief.

I.

Since the First Amendment Prohibits the Banning of a Book Which Is Not "Utterly Without Redeeming Social Importance", the Conviction Here for Selling the Book "Tropic of Cancer" Cannot be Sustained.

We agree with the argument made in other briefs in this case and in *Jacobellis v. Ohio,* No. 11, this term, that the basic concept that obscenity, however that may be defined, is not protected by the First Amendment and that words written which fall within

[1]Since those cases, the United States has reversed the position it there took and has agreed through both the Customs Service (*United States v. Three Books,* Civ. No. 610685, U.S.D.C. E.D. N.Y., consent order of Aug. 15, 1961) and the Post Office Department (N.Y. Times, June 14, 1961) that the book is not obscene and cannot be denied entry into the country nor transmission through the mails.

that "definition" are not to be judged by the same standards as words written on other subjects, should be re-examined and rejected. In this brief, however, we shall briefly point up that even within the *Roth-Alberts* standard, the conviction below cannot stand.

The dismal chronicle of writings which have been banned over the years[2] attests to the fact that under the First Amendment and under *Roth v. United States,* 354 U. S. 476, the censor's ax cannot be permitted to fell so serious a work of literary merit as "Tropic of Cancer".

In *Roth,* this Court, admonishing that "the door barring federal and state intrusion into this area (of free speech and press) . . . (may be) opened only the slightest crack," (354 U. S. at 488) held that "(a)ll ideas having even the slightest redeeming social importance . . . have the full protection of the guarantees." (354 U. S. at 484). It is for this reason that it held obscenity not to be protected by the First Amendment, for "obscenity (is) utterly without redeeming social importance." (*ibid.*). Conversely, this also makes clear that a work cannot constitutionally be held to be obscene if it is not utterly without redeeming social importance. That is to say, if a work has *some* redeeming social importance, it cannot, in the very nature of things and according to the plain meaning of the English language, be utterly with-

[2]From Homer to Dante, to Galileo, to John Milton, to Jonathan Swift and to Thomas Paine; to Goethe, Shelley and Heinrich Heine; to Charles Darwin and Harriet Beecher Stowe; to Walt Whitman, Flaubert and Ibsen; to Emile Zola, Anatole France and de Maupassant; to Theodore Dreiser, Upton Sinclair and James Joyce; to Eugene O'Neill, Aldous Huxley and William Faulkner. (See "Banned Books" by Ann Lyon Haight [R. R. Bowker Co., 2d Ed., 1955].)

out redeeming social importance. Or, put another way: "utterly" means "utterly", and "utterly without" means precisely that.

This is clear not only as a matter of the definitions of words,[3] but is likewise the meaning which the courts have given to the words, "utter" or "utterly" when they have had occasion to construe those words.

Thus, in *The Delaware Mutual Safety Insurance Company v. Grossler,* 96 U. S. 645, 24 L.ed 863, a maritime bond provided that "if in the course of the voyage, an utter loss of the vessel by . . . accidents or casualties of the sea or navigation, shall unavoidably happen, then the loan and interest shall not be payable; . . ." The vessel, en route from Java to Boston, was caught up in a storm, wrecked and driven ashore on Cape Cod. So much was the damage to the ship that the cost of repairs would greatly exceed her value when repaired. So the vessel was not repaired and the claim was made that the money was not payable because the ship had been "utterly lost". This Court ruled against this contention, thus giving to the words "utterly lost" the normal meaning they convey (24 L.ed at 866):

> "Unless the ship be actually destroyed, and the loss to the owners absolute, it is not an utter loss within the meaning of such a contract. If the ship still exists, although in such a state of damage as to be constructively totally lost, within the meaning of a policy of insurance; . . . she is not utterly lost, . . ."

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[3]Webster's Third New International Dictionary defines utterly as "in an utter manner: to an absolute or extreme degree: to the full extent: absolutely, altogether, entirely, fully, thoroughly, totally". Black's Law Dictionary, 4th Edition, does not contain a definition of the adverb, utterly, but defines the adjective, utter, as "entire, complete, absolute, total".

And again (24 L.ed at 867):

> ". . . Nothing short of a total loss will discharge the borrower . . ."

And (24 L.ed at 868):

> ". . . (I)f the ship exists *in specie*, though in a state which would warrant an insured to make an abandonment, as where the cost of repairs would greatly exceed the value when repaired, the lender on bottomry may still recover; for the ship must be absolutely and wholly destroyed, in order to discharge the borrowers . . ."

In accord is *Insurance Company of Pennsylvania v. Duval*, (Pa) 8 Serg. & R. 138, 148.

Similarly, when a statute makes "utter desertion" a ground for divorce, the words mean just that and not something short thereof. In *Moody v. Moody*, 118 Me. 454, 456, 108 Atl. 849, speaking of the meaning of such a statute, the court said:

> ". . . We apprehend that the word 'utter' is used in its ordinary acceptation, 'entire and complete, absolute, total;' utter desertion involves an 'abnegation of all the duties and obligations resulting from the marriage contract.' . . ."

And so when a wife refused without good cause to have sexual intercourse with her husband, the court refused to grant a divorce on the ground of "utter desertion", because "(s)exual intercourse is only one marital right or duty." (*Stewart v. Stewart*, 78 Me. 548, 552, 7 Atl. 473). Distinguishing cases which

have granted divorces for such conduct on the ground of "desertion", the court said (*ibid.*):

> ". . . There is a difference between the statutes of those states, and our statute. Our statute uses the phrase, 'utter desertion'. The statutes upon which the opposing decisions are based, omit the word, utter. . . ."

In *Pearsall v. Chapin,* 44 Pa. St. 9, 8 Wright 9, where the statute made certain alienations by bishops and other ecclesiastics and certain forms of alienation of entailed estates void, absolutely void, or utterly void, the court said (p. 14):

> ". . . The word *absolutely,* here (is) being used not as contrasted with *relatively,* but as equivalent to *utterly.*" (emphasis in original)

It is submitted, therefore, that with the place "Tropic of Cancer" has made for itself as a work of serious literature, it simply cannot be held that "Tropic" is "absolutely", "altogether", "entirely", "fully", "totally", "completely" without redeeming social importance; to do so would defy all logic as well as law. Amicus is aware that there were witnesses for the respondent in this case, who were of the view that the book is obscene. But the witnesses for the petitioner testified contrariwise. Because of the stringent standard, "utterly without redeeming social importance", which the respondent must meet, with this reputable body of testimony as to the book's worth in the record, it simply cannot be held as a matter of constitutional law that the State has met its burden. This is not a question of the jury having resolved a "conflict of evidence". The determination which must be made is

one of constitutional fact. As to such a determination, this Court makes its own judgment, especially when free speech is involved (*Wood v. Georgia,* 370 U. S. 375, 386; *Burstyn v. Wilson,* 343 U. S. 495, 506-7, conc. op.), and particularly when the question of obscenity is involved. See this Court's latest decision on the subject (*Manual Enterprizes v. Day,* 370 U. S. 478, 488.)

See also Mr. Justice Harlan, concurring and dissenting, in *Roth v. United States,* 354 U. S. 476, 497-8.

The court below, in allowing suppression of the book, has permitted transgression against that most sensitive of constitutional rights: the public's right to read (*Cf. Smith v. California,* 361 U. S. 147, 154).

Conclusion.

The judgment below should be reversed.

Respectfully submitted,

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